



## THE CITY OF SAN DIEGO **MANAGER'S REPORT**

DATE ISSUED: February 7, 2001 REPORT NO. 01-025

ATTENTION: Honorable Mayor and City Council  
Docket of February 13, 2001

SUBJECT: Amendment of Municipal Code Regulations on Encroachments: Public Right-of-Way Use Permit Procedures and Encroachment of Walls and Fences in the Public Right-of-Way

REFERENCE: Manager's Report No. 00-190, dated September 19, 2000

### SUMMARY

Issues - 1) Should the City Council adopt an ordinance amending the San Diego Municipal Code to add a Section, "Public Right-of-Way Use Permit Procedures?"

2) Should the City Council adopt an ordinance amending the San Diego Municipal Code, Chapter 6, Encroachments, to remove the language which prohibits the granting of the encroachment of walls and fences in the public right-of-way?

Manager's Recommendation - Approve the ordinance amending the Municipal Code to add the Section, "Public Right-of-Way Use Permit Procedures." Direct staff to process requests for Public Right-of-Way Use Permits as a Process Four. Approve the ordinance amending the Municipal Code to remove the language which prohibits the granting of encroachments of walls and fences in the public right-of-way. Direct staff to process requests for the encroachment of walls and fences as a Process Two.

Other Recommendations - The Land Use & Housing Committee approved the Manager's Report No. 00-190 on September 20, 2000, which directed staff to take the draft ordinance regarding the Public Right-of-Way Use Permit Procedures to the Planning Commission for recommendation and to City Council for approval. The Planning Commission recommended 6-1 at their hearing on October 19, 2000 that the City Council approve the ordinance amending the Municipal Code to add the Section, "Public Right-of-Way Use Permit Procedures." The Planning Commission further recommended that staff process

requests for Public Right-of-Way Use Permits as a Process Four decision to ensure adequate public notice and environmental review.

Fiscal Impact - None.

## BACKGROUND

The proposed amendments to the Municipal Code will allow the City to deal more effectively with a variety of encroachment issues. The Public Right-of-Way Use Permit Procedures will allow the City to consider granting encroachments wherein the requestor does not have underlying fee title. The removal of the prohibition against walls and fences in the public right-of-way as stated in Chapter 6 (Section 62.0302) of the Municipal Code will reconcile this section of the Municipal Code with the Land Development Code (Municipal Code Chapters 11-14).

The City has received requests from organizations to install monofilament wire over the public right-of-way to help establish symbolic boundaries around areas of the City. The area enclosed by such a boundary would be known as an Eruv (Eruvin, plural). The Land Use and Housing Committee members were apprised of these requests and that the City Manager would develop a policy and approval process to address these requests.

The City currently has an encroachment approval process to enable property owners to place encroachments within the public right-of-way where the owner holds the underlying fee title. For the City to grant encroachments over public rights-of-way dedicated over privately held properties not owned by the requestor, the Municipal Code would need to be amended. In addition to the proposed Eruvin, there are other situations in which a requestor of an encroachment may not hold the underlying fee title. The City needs a process to consider these situations as well.

In another encroachment issue, the Municipal Code is currently not consistent with regards to the granting of encroachments for walls and fences in the public right-of way. The Land Development Code currently provides for the City's consideration of requests for the encroachment of walls and fences in the public right of way. However, Chapter 6 of the Municipal Code contains a prohibition against walls and fences in the public right of way. The proposed ordinance to remove this prohibition will allow the City to approve such encroachments provided certain criteria are met.

## DISCUSSION

### Public Right of Way Use Permit Procedures

Encroachments within the public right-of-way are addressed under Section 62.0302 of the Municipal Code. However, the only encroachments authorized under this Section are those in which the applicant owns the underlying property. In such cases, an Encroachment Maintenance

and Removal Agreement is recorded against the owner's property. This agreement binds the owner to maintain the encroachment in a safe and sanitary condition. It also binds the owner to indemnify the City from any liability arising from the encroachment.

The proposed amendment, Public Right-of-Way Use Permit Procedures would allow for encroachments where the applicant does not hold the underlying fee title. The draft ordinance, provides that the applicant for an encroachment, would be required to maintain the encroaching structure in a safe condition. The applicant would also have to indemnify the City from any liability arising from the encroachment. Staff recommends that the Public Right-of-Way Use Permit be processed as a Process Four decision appealable to the City Council. The Code Monitoring Team (a Land Development Code update oversight committee) and the Planning Commission recommend that the permit be a Process Four approval with a decision by the Planning Commission appealable to the City Council.

The proposed amendment does not supersede the provisions of other applicable regulations such as the San Diego Municipal Code Section 61.0509 (Prohibition of Poles and Wires in Underground Utility Districts) nor franchise agreements. Pursuant to the proposed ordinance, an applicant for a Public Right-of-Way Permit will still be required to comply with all applicable laws and regulations.

The Public Right-of-Way Use Permit would provide City staff greater options in dealing with encroachment requests. In addition to the Eruvin requests, the following encroachments could be considered:

- sewer and water laterals
- private bus shelters
- non-franchise phone booths
- private mail collection boxes
- business improvement association commercial enhancements

Business improvement associations may desire to construct and maintain certain amenities in the public right-of-way to enhance commercial activity. Under the current Municipal Code provisions, the individual property owners would have to get encroachment permits for that portion of the amenities that falls on their property. The individual property owners would also have to indemnify the City from any liability that may arise from amenities. The apportionment of the encroachments could be cumbersome: encroaching structures may not lie solely on any one property. Also, the cost of indemnification may be prohibitive for individual property owners. However, the Public Right-of-Way Use Permit Procedures would provide for the business improvement association to become responsible for the encroachment. The business improvement association would more easily obtain the required indemnification policies, and would avoid the problems of encroaching structures lying across one or more properties.

## Encroachment of Walls and Fences in the Public Right of Way

Encroachment permits are addressed under Sections 62.0301 and 62.0302 of the Municipal Code. They provide the authority to grant encroachment permits with the attendant requirements. This permit is in the form of an Encroachment Maintenance and Removal Agreement, which is recorded against the owner's property. This agreement binds the owner to maintain the encroachment in a safe and sanitary condition. It also binds the owner to indemnify the City from any liability arising from the encroachment. Section 62.0301 states that an encroachment permit shall not be granted for walls and fences.

There may arise situations where it is desirable for a property owner to have a wall or fence in the public right-of-way to maintain privacy for the enjoyment or use of the property. The only feasible engineering solution for the desired barrier may entail the encroachment of some portion of a wall into the public right-of-way. For example, a retaining wall footing may encroach in the public right-of-way. With the removal of the prohibition cited in Chapter 6 of the Municipal Code, staff will review the proposed encroachment and notify those in the vicinity. Staff will make a decision on the encroachment based on their findings. This decision will be appealable to the Planning Commission.

The proposed amendment to Section 62.0301 of the Municipal Code to remove the prohibition against granting encroachments for walls and fences in the public right-of-way, will make the section consistent with the more recently adopted Land Development Code. Chapters 12 and 14 of the Municipal Code provide that the encroachment of walls and fences may be considered. Moreover, it will provide for the review process (Process Two) for the granting of such encroachments.

## CONCLUSION

Staff recommends that City Council adopt an ordinance amending the Municipal Code to add the Section, "Public Right-of-Way Use Permit Procedures"; and that staff be directed to process requests for the Public Right-of-Way Use Permit as a Process Four. The Public Right-of-Way Use Permit Procedures will provide the City a mechanism to consider requests for these encroachments when they are to the public good. The findings which must be made for approval of the encroachment will ensure protection of the rights of the fee owner of the property as well as the rights of the public to the unobstructed use of the public right-of-way.

Staff further recommends that City Council adopt an ordinance amending the Municipal Code to remove the prohibition against granting encroachment permits for walls and fences in the public right-of-way. The current Land Development Code already provides for consideration of these encroachments. The requests for these encroachments would be processed as a Process Two to ensure adequate public notice.

## ALTERNATIVES

1. Adopt the proposed ordinance for Public Right-of-Way Use Permit Procedures with the revision that the approval of the abutting property owners be obtained for proposed encroachments.
2. Adopt the proposed ordinance as a Process Two decision, under which staff's decision is appealable to the Planning Commission.
3. Do not adopt the ordinance for Public Right-of-Way Use Permit Procedures.
4. Do not adopt the proposed ordinance for the revision to Chapter 6 of the Municipal Code, Encroachments.

Respectfully submitted,

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Tina P. Christiansen, A.I.A.  
Development Services Director

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Approved: George I. Loveland  
Senior Deputy City Manager

HAASE/WESTON

- Attachments:
1. Proposed Ordinance Amending the Municipal Code to Add "Public Right-of-Way Use Permit Procedures"
  2. Proposed Ordinance Amending Municipal Code Sections 62.0301 and 62.0302 regarding Encroachment Removal Agreements